NO. 82-1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
APPELLANT
V.
HARRY PTASYNSKI, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF OF AMICI CURIAE,
THE LEGAL FOUNDATION OF AMERICA,
NATIONAL ROYALTY OWNERS ASSOCIATION,
GUS HOLLIS, MAXINE HOLLIS, AND
JEAN WALSH QUINETTE

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INTEREST OF AMICI CURIAE

Gus Hollis, Maxine Hollis and Jean Walsh Quinette are elderly holders of small interests in oil and gas production subject to the Crude Oil Windfall Profit Tax. These individual taxpayer amici have found their retirements jeopardized by the Tax and have filed suit, in an action parallel to the case at bar, to declare the Tax unconstitutional. That suit is styled Hollis v. United States, No. 82-1780, and is now pending in the United States Court of Appeals for the Tenth Circuit. It is to protect their interest in that action that these individual amici appear in this honorable Supreme Court.

The interests of the Hollises are of such size that they seek a refund of $4,437.82 in their suit. Mrs. Quinette seeks a refund of $823.99. The Government has so classified all three taxpayers as to place each in the seventy percent (70%) bracket. The

Hollises reside on and work a family farm in Oklahoma, while Mrs. Quinette is a retired former church worker. None of these amici earns profit that can justly be called a "windfall," nor does any of them fit the sterotype of "big" or "major" producers that were described as the target of the Tax in Congressional debate. Instead, they are typical of the small royalty owners that have borne the heaviest burden of the Tax. That burden is made proportionately greater by the discriminatory nature of the tax, owing to such exemptions as the Alaskan exemption that was the basis of the district court's decision in this case.

These individual amici are members of amicus National Royalty Owner's Association ("NARO"), which is an association of owners of interests in oil and gas production. NARO's members include many persons residing in Texas and Oklahoma, which are the two States most severely affected by the Tax at issue here.

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm. Its goals include preservation of the market system, removal of unreasonable regulation, and attainment of a better balance between the federal government and the States. LFA attorneys represent the individual and association amici herein on a pro bono basis.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case made by appellees, Harry Ptasynski, et al., and by the States of Texas and Louisiana.

SUMMARY OF ARGUMENT

The Government concedes that the Alaskan exemption is geographically drawn, and it impliedly concedes that a "literal" application of the requirement of geographic uniformity would lead to a holding of unconstitutionality. Nevertheless, the Government seeks to uphold the Alaskan exemption on the ground that it can articulate a "rational basis" for the non-

uniformity, namely, "high production costs" and "transport costs" that it alleges to be unique to Alaska.

This argument should be rejected, first, because the exemption is not part of a uniform national plan taking costs into account. Petroleum is found in all fifty States, and it is produced from many places with high production and transport costs, but Alaska is the only such place afforded exemption. The incidence of the tax is so concentrated that five-sixths of the resulting state tax loss will be suffered by just two States, Texas and Oklahoma, which are average and below average in per capita income, respectively, while Alaska has the highest per capita income of any State in the nation.

Secondly, the "rational basis" test suggested by the Government would destroy the uniformity requirement. If only a rational basis were required to justify geographical variations, the uniformity requirement would add nothing that is not already present in the looser requirement of due process. Given the nature of taxation and the fact that every state is different, almost any discrimination could be so justified. The uniformity requirement is a specific enactment directed at a specific issue, as are the privilege against self-incrimination, the contract clause and the first amendment; at the very least, a compelling governmental interest should be required before it is overcome. The history underlying its adoption refutes the assertion that the mere articulation of some rational basis should suffice.[1]

ARGUMENT AND AUTHORITIES

I. THE GOVERNMENT'S ARGUMENT THAT THE ALASKA EXEMPTION, THOUGH GEO-

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1 Amici agree with, and adopt, Appellees' arguments with respect to the non-severability of the exemption. Retroactive impairment would create havoc with respect to massive investment undertaken in reliance on the exemption. Amici have not here repeated these arguments of Appellees but wish to express support for them.

GRAPHICALLY NOT UNIFORM, IS UNIFORM BECAUSE IT CAN ALLEGEDLY BE "COST JUSTIFIED," IS INAPPOSITE.

It is established by a mass of cases that the "uniformity" required by the constitution is geographic uniformity. [2] The test for such uniformity is that a "tax is uniform when it operates with the same force and effect in every place where the subject is found." [3]

The government concedes that the Alaska exemption is geographically defined. It further concedes that a literal application of this geographic test supports the lower court's ruling that the tax in this case is unconstitutional. Jurisdictional Statement 14; cf. Brief at 28.

The Government seeks to avoid the effect of the uniformity clause by an argument that rests upon "transportation costs" associated with exempt Alaskan oil. Jurisdictional Statement 11; Brief at 17-18. This "cost justification" argument cannot, however, make the Alaska exemption uniform, because it is simply not part of a uniform national plan taking costs into account.

A. *Assuming that transportation costs are to be taken into account, the "uniformity" provision, at minimum, requires that they be taken into account by a uniform nationwide plan treating all transportation or production costs fairly.*

Even if high production costs may legitimately be taken into account by a taxing scheme, a uniform national plan must

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2 E.g., Head Money Cases, 112 U. S. 580 (1884); Knowlton v. Moore, 178 U. S. 96 (1900); Billings v. United States, 232 U. S. 261 (1914); La Belle Iron Works v. United States, 256 U. S. 377 (1921); Steward Machine Co. v. Davis, 301 U. S. 583 (1934); Fernandez v. Weiner, 326 U. S. 340 (1945).

3 See authorities cited in note 2, supra.

be used. The decision in Standard Oil Co. v. McLaughlin, 67 F.2d 111 (9th Cir. 1933), has certain striking similarities to the present case in that it dealt with a taxing scheme taking transport costs into account. Specifically, Standard Oil Co. v. McLaughlin shows how a national plan can be made uniform with regard to such transport costs. In that case, the Commissioner was empowered to determine a reasonable transportation charge.[4] This charge was in turn used in figuring the tax. The Court said:

> The mere fact that the base on which the 8 per cent tax is computed may vary in different cases, due to different circumstances bearing on the reasonableness of the charge for the transportation of oil and pipelines, does not constitute a lack of uniformity as that term is used in connection with excise taxes. *The amount of the tax in each case will depend upon the amount of oil transported and the reasonable charge therefor* but all those under the same circumstances will pay the same tax.

Id. In the case at bar, there is no such uniformity. The tax does not depend upon "the amount of oil . . . and the reasonable charge" for producing or transporting it, but upon the accident of geography.[5]

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4 McLaughlin is slightly different in that the transport cost was the subject of the excise rather than an alleged basis for exemption. This difference is not material, however, since the requirement of a nationwide plan is the gist of the holding, and that requirement is not met here.

5 Louisiana Public Service Commission v. Texas & N.O.R. Co., 284 U. S. 125 (1931), though cited by the United States here, actually supports appellees, not the United States. In that case, Congress had attempted to create a uniform, nondiscriminatory scheme of rail transport rates throughout the United States. Pursuant to authority given it by Congress, the Interstate Commerce Commission had prescribed interstate and intrastate rates that were nondiscriminatory. The message of the case is simply that the basing of distinctions

That a uniform national plan is required is made clear in the decisions of this court. Knowlton v. Moore, supra, states that uniformity requires that "whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States." In the Head Money Cases, the tax in question was imposed upon each passenger brought to the United States from a foreign country; it was held uniform because it operated "precisely alike in every port of the United States where such passengers can be landed." And in Fernandez v. Weiner, supra, the Court upheld a tax laid with respect to all community property interests in all states, stating that it was "applicable throughout the United States wherever such interests may be found." [6]

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upon nondiscriminatory rate computations, set up as part of a uniform national plan, is constitutional.

The Court's specific holding in Louisiana Public Service was that incidental effects upon states or ports from the legitimate exercise of the commerce power was constitutional:

> Congress, acting under the Commerce Clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring states. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors, and the providing of structures for the convenient and economical handling of traffic, are examples.

Id. at 131.

The present case is clearly different. It does not concern an "incidental" effect produced by unrelated exercise of the commerce power. The discriminatory exemption is apparent from the face of the tax, and it is intentionally and unnecessarily imposed. The plan is not a uniform nationwide one, but an ad hoc regional benefit.

6 In response to this argument, the United States cites bankruptcy and port preference cases. The cases so cited are inapposite and they do not rebut the requirement of taxation with "the same force and effect" wherever the subject of the tax "may be found."

For example, Louisiana Public Service Commission v. Texas & N.O.R. Co., supra, indicates that the port preference clause was included in the constitution "to prevent preferences as between states in respect of their ports . . . ." The Alaska exemption from the Windfall Profit Tax violates this purpose because it involves the

The Government's brief points out that this is the first case in which a tax has been held unconstitutional for violation of the uniformity provision. Jurisdictional Statement 14. However, that argument does not support the Government's position, because this is also the first excise case in which the Government

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preference of one state over several others, who are in fact parties to this suit.

The United States also relies heavily upon Blanchette v. Connecticut General Insurance Corps., 419 U. S. 102 (1974), which involves the application of the "uniform bankruptcy" clause to the Rail Act. But that case is clearly distinguishable; there, the Court said:

> . . . the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.
>
> The uniformity clause requires that the rail act apply equally to all creditors and all debtors, and plainly this act fulfills those requirements.

Id. at 159-60. The present case is obviously different because holders of interests in oil, who are analogous to the railroads and their creditors, are obviously not treated "equally" or "uniformly" by the Windfall Profit Tax.

As the Blanchette Court said, "No provision of the [Rail] Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism." Id. The Windfall Profit Tax, on the other hand, involves clear distinctions between the right of creditors (holders of interests in oil) because of regionalism.

Furthermore, comparison of the excise tax uniformity clause with the bankruptcy clause is misleading, because the purpose of the requirement of uniformity in the bankruptcy clause was different. It was "to prohibit Congress from enacting private bankruptcy laws." States had "discriminated against British creditors," and "the States' practice of enacting private bills had rendered uniformity impossible." Railway Labor Executives Ass'n v. Gibbons, 102 S. Ct. 1169, 1178 (1982). But while the purpose of the "uniform" bankruptcy clause thus was to prevent discrimination against private citizens, allowing more flexibility on a regional basis, the purpose of the uniform taxation requirement was different and was tied to that of the port preference clause: To protect States against State-by-State regional discrimination. Since the purpose of the "uniform bankruptcy" clause is entirely different from that of the "uniform excise" clause, the bankruptcy cases are not on point, and the reliance of the United States upon them is inappropriate.

has so clearly violated the uniformity clause as to enact an exemption that is expressly geographically defined. Because there is an unbroken line of decisions indicating that geographic uniformity is required, no previous Congress has ever enacted such a tax.

B. The Alaska exemption is not part of a uniform national plan, because crude oil located in the other forty-nine States is not taxed with "the same force and effect" even though it may be as costly or more costly to produce.

(1) There are similar "high production costs" and "high transport costs" in numerous areas throughout the nation, but those areas are not given the preference accorded to Alaska.

There are many areas in which there are "high production costs"–including offshore areas, areas producing heavy oil, deep oil horizons, and fields requiring secondary and tertiary flooding. The proposition that the exemption in Alaska is cost justified, while hard-to-produce heavy wax crude from Utah is severely taxed, or while production eked out by expensive detergent flooding is in the 70 per cent bracket, or while Baltimore Canyon wells deep in the Atlantic produce dry holes, should not be accepted. These areas are not "uniformly" exempted.[7] In reality, the product itself–crude oil–is what is taxed, and the Alaskan exemption results in its being taxed otherwise than "with the same force and effect in every place where . . . it is found." Cf. United States v. Singer, 15 Wall. 111, 121 (1872) (A tax must be

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7 The Government distinguishes the Alaska exemption in part by rhetoric concerning "windfall profit." E.g., Brief for the United States at 19. The same analysis would lead to the conclusion that there is no "windfall profit" from other areas, such as the Baltimore Canyon, Outer Continental Shelf, secondary and tertiary recovery fields, and the like. In fact, since "windfall profit" is defined without reference to either windfalls or profit, and can exist when a taxpayer has had a loss on overall operations, this argument is particularly unpersuasive.

"assessed equally upon all manufacturers . . . wherever they are. [It may not] establish one rule for one . . . and a different rule for another, but the same rule for all alike.")

(2) The proponents of the tax recognized its non-uniformity in the Congressional debate, and they also recognized that the Alaskan exemption was not based upon cost considerations.

The proponents of the tax recognized the "uniformity" argument in the Congressional debate. As one Senator stated, plans were necessary

> *In the event the courts should find this favorable treatment for Alaska . . . should violate the uniformity provision* in the constitution . . . . [Or] if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption . . . .

126 Cong. Rec. S3056 (Mar. 26, 1980) (emphasis added). The same Senator introduced into the record a memorandum from the Office of the Legislative Counsel, stating that "it may be noted that the issue raised with respect to the Alaskan oil exemption is that *the exemption . . . might be held to violate the constitutional requirement that 'excises shall be uniform* throughout the United States.' " Id. (emphasis added).

The debate not only thus recognized the potential constitutional infirmity, but went on to recognize that the exemption was not cost justified. Senator Long stated that if the exemption were held unconstitutional, then, in that event, the Congress would attempt to pass a provision based upon uniform cost justification.

> As I say, if that [i.e., a declaration of unconstitutionality] were to be the case *we would expect to act in the future to remedy this and to provide some consideration based on the cost of transportation* and the high cost of

developing oil and producing oil in those areas

. . . .

126 Cong. Rec. S3056 (Mar. 26, 1980). The recognition that the current exemption was not cost justified, and that it would have to be replaced "in the future" by a provision "based on the cost of transportation and the high cost of developing oil and producing oil," is crystal clear.

In this connection, it is noteworthy that the next Congress repealed a parallel preferential treatment[8] afforded Alaskan oil from the Sadlerochit Reservoir on the ground that it provided a benefit based solely on regionalism and could not be cost-justified. House Report on Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 97th Cong., 2d Sess. 396-97 (1982) (expressly stating that the preference could not "be justified"). Precisely the same reasoning applies to the exemption here at issue. Indeed, the Sadlerochit preference--which Congress has now found cannot be justified, even by a "rational basis"--provides an independent basis for a finding of non-uniformity.

(3) The Alaska exemption is the product not of cost justification, but of a political "combination" of precisely the type the uniformity provision was designed to prevent.

The effects of the Windfall Profit Tax are carefully calibrated to impact upon only a handful of States. In fact, it is striking how the incidence of the tax is concentrated. More than five-sixths of the resulting loss in state tax revenues, for example, will be felt by just two states--Texas and Oklahoma.

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8 Sadlerochit oil was afforded a special, artificial "base adjustment," increasing its "base price." Since the base price is subtracted from the "removal price" (which is usually the selling price) to compute the tax, this base adjustment reduced the tax on Sadlerochit oil. The Sadlerochit base adjustment was originally advanced as a concession to alleged high production and transport costs and was hence similar in nature to the exemption here at issue.

Interstate Oil Compact Commission, *The Effects of the Crude Oil Windfall Profit Tax on Recoverable Crude Oil Reserves* 36 (Library of Cong. 1980).

The tax thus achieved the purpose of shifting its incidence from relatively wealthy states to relatively poor ones. Contrary to myth, Texas and Oklahoma are not among the nation's richest states. Indeed, Texas is average in per capita income, and Oklahoma is significantly below average.[9] By contrast, Alaska is the wealthiest state in the union, and is first in per capita income.[10] The reason for this difference is attributable, in part, to preferential treatment through the windfall profit tax. This honorable Court had occasion to describe Alaska's own windfall in Zobel v. Williams, 102 S. Ct. 2309, 2311 (1982), as follows:

> The 1967 discovery of large oil reserves . . . [in] Alaska resulted in a windfall to the state. The state, which had a total budget of $124 million in 1969, before the revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year. This income will continue, and most likely grow for some years in the future.

Thus the sheer impact of the tax, standing alone, would give rise to the inference that it accomplished precisely the sort of discrimination the uniformity provision was designed to prevent.

Furthermore, the circumstances of the Alaska exemption show that it was the product of a political combination. The

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9 U. S. News & World Report, Sept. 27, 1982, at 13.

10 Id. Alaska recently initiated a "share-the-wealth" program in which it gave away a substantial portion of its oil income in the form of "dividends" to citizens. The first such payment was $1000 to each man, woman and child residing in the State. Zobel v. Williams, supra.

debate was filled with venomous and irrational attacks upon "big oil"[11] in the face of clear evidence that the "windfall profit" attributed to such producers simply did not exist.[12] But since oil is to be found in all fifty states, and is produced in significant quantities in several, it became necessary to obtain the votes of certain Senators from oil-producing states. Senator Gravel was one of the most outspoken opponents of the tax, and Senator Stevens was the acting majority leader of the Senate. Their price for supporting the tax was the Alaska exemption and Sadlerochit base adjustment. The Congressional Record makes it clear that Senator Stevens, in particular, was especially instru-

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11 For example, House Floor Manager Rep. Ullman called industry profits "extraordinary . . . [and] staggering." Rep. Vanik said they were "horrendous . . . . They have enough profits stashed away to search all over the moon for oil." Rep. Peyser called these profits "excess;" Rep. Harris, "soar[ing] . . . [resulting from] greed for excess profits." Other Congressmembers variously described industry profits as "a bonanza," "enormous," "skyrocketing," and "unconscionable." Even more intemperate remarks were made in the Senate. 125 Cong. Rec. H2589, H5295, H5305, H5313, (June 28, 1979); 126 Id. E1437 (Mar. 24, 1980); Id. H1848, H1846 (Mar. 13, 1980); Id. S3129, 3138 (Mar. 27, 1980); 125 Cong. Rec. S1849-50 (Dec. 18, 1979); Id. S18290 (Dec. 12, 1979).

In the House, Floor Manager Ullman said his opponents wanted to "give it all to the oil companies." Id. H5312.

The reason for this emotion was an irrational search for someone to blame for the unavailability of cheap oil. Rep. Jenkins explained: "We are witnessing the . . . end of a lifestyle that . . . has depended upon unlimited and inexpensive oil. Consequently, the American people are frustrated, concerned and angry" at oil companies. Id. H5302.

12 Profits of crude oil producers were (and are) not excessive. Treasury Secretary Blumenthal admitted that: ". . . the rates of return . . . in the oil and gas extraction industry . . . are not greater than the average on other manufacturing; they are about the same." Senate Hearings 81. The data available to Congress supported this view. See Senate Report 552, 639. Drug manufacturers earned nearly 50 per cent more but were not taxed. Id. Currently, of course, the industry is in a deep recession; drilling activity is depressed, and oil producers have undertaken massive layoffs of employees.

mental in putting together the combination that passed the tax, and that his price for doing so was favorable treatment for Alaska.[13]

II. THE GOVERNMENT'S ARGUMENT, THAT THE MERE ARTICULATION OF A "RATIONAL BASIS" CAN SAVE THE EXEMPTION FROM NON-UNIFORMITY, IS INCONSISTENT WITH THE HISTORY AND PURPOSE OF THE CLAUSE.

While conceding that "a literal application" of the uniformity provision would make the tax unconstitutional (Jurisdictional Statement at 14; Cf. Merits Brief at 28), the Government argues that the exemption should nevertheless be upheld because it is "supported by rational considerations," Id. at 16, or a "rational basis," Id. at 18, Merits Brief at 28. This argument would destroy the uniformity provision, is inconsistent with its history and purpose, and should be rejected.

A. *The Government's "rational basis" argument would make the uniformity provision redundant of the due process clause.*

If the Government's argument is correct, the founders added nothing by including the uniformity requirement in the Constitution, because the due process clause already accomplishes what the uniformity clause is claimed by the Government to accomplish. If a taxpayer must show that there is literally no "rational basis" supporting a tax in order to show that it is not "uniform," then the uniformity provision adds nothing, because

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13 The tax was the product of extensive negotiations. After those negotiations, Senators Dole and Byrd, who had been principal participants in the negotiations, stated their thanks to Senator Stevens for his role in bringing about the Windfall Profit Tax. 125 Cong. Rec. S18564, S18566. Senator Stevens expressed his reluctant approval of the compromise and his opposition to any increase in taxation of Alaskan oil. Id. at S18565.

such a powerful showing would prove a violation of even the less rigorous due process standard. Nebbia v. New York, 291 U. S. 502 (1934); Lochner v. New York, 198 U. S. 45 (1905) (Holmes, J., dissenting). It should not be assumed that the founders intended to write meaningless language when they added the uniformity provision.

Furthermore, a mere "rational basis" standard would be inappropriate in this area. When the allocation of tax impacts among states is at issue, a "rational basis" can be found to mask almost any discrimination.[14] As an example, if a state is relatively poor, because it produces little oil or only at high cost, rational basis might be found for exemption merely in the name of tax equity, if such were permitted. On the other hand, if a state seemed likely to produce a great deal of oil, and to become very wealthy, rational basis could be articulated in the name of increasing production. The founders did not intend that the uniformity provision be construed so that every imaginable result could be justified by the articulation of some "rational basis."[15]

B. *The uniformity provision is a specific and unequivocal prohibition, as are, for example, the first amendment, the contract clause, or the fifth amendment, and it should be construed accordingly.*

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14 In this case, even a "rational basis" is actually lacking, unless the purpose is interstate discrimination. Subsidizing the production of expensive oil first, in preference to more readily available alternatives, is irrational. One might just as sensibly subsidize a preference for the harvesting of apples located highest on the tree, that could be picked only by helicopter. The exemption thus makes no sense as an economic measure. As a discrimination between States, it makes sense; this purpose, however, is unconstitutional.

15 It should be re-emphasized that discrimination in federal excise taxes, which concerns the sensitive relationship of the States to the federal government, presents an entirely different problem from variations in regulation of private relationships, such as bankruptcy laws. It is clear that both the purpose and the history of the bankruptcy uniformity clause are different. See note 6 supra.

Unlike the due process clause, the uniformity provision is a specific, narrow and unequivocal prohibition. Unlike the due process clause, it does not apply to all enactments; it only touches upon those that apportion taxes among states. It is a specific standard, directed to a specific evil.

The Government's argument, if applied to the fifth amendment, would allow abolition of the privilege against self-incrimination, subject merely to the requirement that the abrogation be "supported by rational considerations," cf. Jurisdictional Statement 16, Brief of the United States at 28. Similarly, the Government's argument would allow the retroactive impairment of contracts whenever a State could articulate a mere rational basis for doing so. Contra, Allied Structural Steel Co. v. Spannaus, 438 U. S. 234 (1978). The Government's argument would even allow first amendment freedoms to be abridged, likewise, in the name of a rational basis.

At the very least, the uniformity provision should require, not a rational basis, but a compelling governmental interest, such as would be required in the case of a suspect classification under the due process clause, or for an impairment of contracts, or in those rare instances in which infringements of speech are allowed.

C. The government's "rational basis" argument contravenes the history of adoption of the uniformity provision.

Under the Articles of Confederation that preceded the Constitution, the States were free from taxation by each other or by the national government. With the Constitution, they granted that power to the national government. The states were acutely aware that this power could be used by political combinations between several States, to impose discriminatory excises or preferences of one port over another.[16]

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16 Such a concern is absent in the case of private bankruptcies, and the bankruptcy "uniformity" provision is entirely different in both his-

The uniformity clause was initially part of the clause prohibiting any preference to the ports of one state over those of any other. "[T]he preference clause . . . and the uniformity clause were . . . treated . . . as one and the same thing, and embodied the same conception." Knowlton v. Moore, supra, 178 U. S. at 106. The two clauses were separated late in the drafting process. Id.

Clearly, the founders did not intend that a tax could be imposed upon the Charleston Harbor in South Carolina while the Boston Harbor was exempted from the tax. Nor would they have accepted the argument that a "rational basis" could support such a discrimination. This conclusion stands even though Boston has a much lower average annual temperature. Indeed, the presence of snow and ice during a substantial part of the year in Boston vastly increases "transport costs" in a way qualitatively different from conditions in Charleston. Nevertheless, there can be no question that the South Carolina delegation would not have urged ratification of the Constitution if such a "rational basis" sufficed to support such a geographically defined discrimination against Charleston in favor of Boston, nor would the delegation from any other State. The Government's "cost justification" arguments contravene the very purpose of the clause.

The error of the Government is in concluding that the uniformity clause is a guarantee, like the due process clause, only of a loose kind of basic fairness. It is not. Instead, it is a compact between the States not to cause the national government to engage in geographically defined exemptions from taxation, even if those exemptions seem to conform to some majority's idea of "fairness" or "rationality." The uniformity provision is intended to be clearcut, specific, and readily enforceable. The founders recognized that the quantum of preference required to be "undue" or the amount of discrimination necessary to be "oppres-

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tory and purpose. See note 6 supra. The heavy reliance placed by the United States on the bankruptcy cases is simply inappropriate.

sive" could be found only in the eye of the beholder.[17] As this honorable Supreme Court said in Hylton v. United States, 3 Dall. 171, 180 (1796), "apportionment . . . involves valuations and assessments . . . . [But] *[u]niformity . . . is at once easy, certain and effacious.*" (emphasis added). The reduction of the uniformity provision to a kind of redundant due process clause would destroy this "certainty, clarity, and efficacy."

The certainty inherent in the uniformity clause is to be inferred, also, from the debate leading to its enactment. An initial proposal required that all taxes be "the same . . . throughout the states *without exemption*." I ELLIOT'S DEBATES 92; cf. 178 U. S. at 96 (emphasis added). The states containing fisheries gave as an example the possibility that a tax on salt might bear most heavily upon them, and the State of Rhode Island expressed concern over discriminatory taxes against commerce to which it was peculiarly a party. I ELLIOT'S DEBATES 101; V ELLIOT'S DEBATES 61; cf. 187 U. S. at 99-100. Even those who felt that the uniformity measure was inadequate because it did not provide sufficient protection understood it as requiring that "excises shall be uniform--*that is, to be laid in the same amount on the same articles in each state.*" I ELLIOT'S DEBATES 396 (Report of Luther Martin) (emphasis in original); cf. 178 U. S. at 106. The court in Knowlton v. Moore summarized these concerns by citing a proposal by Madison that eventually led to the uniformity requirement, by which, according to the court, taxes were "designed to be *the same* all over the union." 178 U. S. at 100 (emphasis in original).

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17 The Government repeatedly characterizes the Constitution as forbidding only "undue" preferences. Neither the port preference clause nor the uniformity provision, however, can reasonably be construed to depend on the extent of the improper preference. In any event, this enactment places five-sixths of its state tax impact upon just two States, see part I (B) (3) supra, while completely exempting a large geographic part of another State; and if such an impact is not "undue," the idea of an "undue preference" is meaningless.

CONCLUSION

The American Revolution was fought largely because of concerns over unfair taxes. The Stamp Tax, the Intolerable Acts, and the Boston Tea Party are part of every school child's education. The Constitution of the newly formed nation contained not one, but several provisions designed to prevent discriminatory or inappropriate taxation. Geographic regionalism in tax impact was a core concern of the Founders of this Republic. It is inconceivable that they intended the uniformity clause to be interpreted as the Government here argues.

This Court should reject the contention of the government that a mere "rational basis" can justify non-uniformity. If a rational basis is present here, it can be found to justify any discrimination. The Court should also reject the argument that a geographical discrimination can stand so long as it is not in the eyes of some majority, "undue." These arguments would destroy the uniformity requirement. Furthermore, this particular tax--the impact of which is concentrated upon a handful of States and which geographically exempts another State because its Senators had influence in Congress--contravenes the basic purpose of the uniformity clause. This exemption is obviously not part of a uniform national plan based on costs, because oil in other areas that is more expensive to produce or transport is not exempted. The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, prior to the filing of this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: Harold B. Scoggins, Jr., Independent Petroleum Association of America, 1101 16th Street, N.W., Washington, D.C. 20036; William H. Brown, Brown, Drew, Apostolos, Massey and Sullivan, 500 Petroleum Building, Casper, Wyoming 82601; Andrew Kever, Assistant Attorney General, Chief, Energy Division, P. O. Box 12548, Capitol Station, Austin, Texas 78711; Lawrence G. Wallace, Acting Solicitor General, Department of Justice, Washington, D.C. 20530; and Gene W. Lafitte, Liskow & Lewis, One Shell Square, 50th Floor, New Orleans, Louisiana 70139; all in accordance with Rule 28.3 of the Rules of this Court.